Supreme Court, U.S.
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No. _____

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In The

Supreme Court of the United States

JANIS CARMONA a/k/a JANIS KESTER,

Petitioner,

v.

JUDY CARMONA, as successor representative of Lupe N. Carmona, deceased,

Respondent.

On Petition For Writ Of Certiorari To The Nevada Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Nevada Supreme Court erred under the Employee Retirement Income Security Act of 1974 (ERISA) as amended by the Retirement Equity Act of 1984 (REA) in affirming the District Court's ordering a constructive trust imposed upon the vested beneficiary of an irrevocable qualified joint and survivor annuity for the benefit of the participant's current wife.

PARTIES TO PROCEEDINGS BELOW

Petitioner

Janis Carmona a/k/a Janis Kester

Respondent

Judy Carmona as Successor Representative
of Lupe N. Carmona, deceased

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PETITION FOR WRIT OF CERTIORARI

Appellant Janis Carmona a/k/a Janis Kester, by and through her attorney, William E. Freedman, respectfully prays that the United States Supreme Court grant a writ of certiorari to review the Order of Affirmance of the Nevada Supreme Court.

INTRODUCTION

This petition presents to the Court the opportunity to determine what effect 29 U.S.C. §§1055(a)(1), (c)(1)(2), (c)(7)(A), (d)(1)(2), (f)(1)(2); 1056(d)(3)(C)(D); 1056(d)(1), (d)(3)(F)(i)(ii); and 1144(a), (c)(1) have on proceedings in Family District Courts when the participant of an ERISA pension plan irrevocably designates his spouse as the beneficiary of a Qualified Joint and Survivor Annuity (QJSA), retires and subsequently divorces. Can the retired participant circumvent the mandates of ERISA by obtaining a constructive trust from the Family District Court to require the ex-spouse to hold the proceeds for the benefit of the current spouse? If the Order of the Nevada Supreme Court is allowed to stand, as will be explained hereafter, it will have a far-reaching effect on family and federal court proceedings throughout the United States.

ORDERS BELOW

The Order of Affirmance of the Nevada Supreme Court of October 21, 2002 (App., *infra,* 1-8) and the Orders of the trial court of April 16, 1999 (App., *infra*, 24-29), June 22, 1999 (App., *infra*, 22-23), March 14, 2000 (App., *infra*, 18-21) and May 31, 2000. (App., *infra,* 11-17)

JURISDICTION

The Order of Affirmance of the Nevada Supreme Court was entered on October 21, 2003. (App., *infra,* 1-8) The Nevada Supreme Court denied a timely Petition for Rehearing on November 21, 2003. (App., *infra,* 45-46) The Nevada Supreme Court denied a timely Petition for En Banc Reconsideration on December 17, 2003. (App., *infra,* 9-10) The jurisdiction of the Court is invoked under 28 U.S.C. §1257(a).

RELEVANT FEDERAL LAW

29 U.S.C. §§1055(a)(1), (c)(1)(2), (c)(7)(A), (d)(1)(2), (f)(1)(2); 1056(d)(3)(C)(D); 1056(d)(1), (d)(3)(F)(i)(ii); and 1144(a), (c)(1) of the Labor Code. (App., *infra,* 47-51)

STATEMENT OF THE CASE

Lupe N. Carmona and Janis Kester were married March 7, 1988. On September 3, 1992, Lupe elected the 66 2/3% Joint and Survivor option with his spouse, Janis Kester, of his Hilton Hotels Retirement Plan. (App., *infra,* 54-58) In September of 1992, Lupe elected the 50% Joint and Survivor option with his spouse, Janis Kester, of his Nevada Resort Association – International Alliance of Theatrical and Stage Employees Local 720 Pension Trust (IATSE). Lupe then retired October 1, 1992. (App., *infra,* 64-67)

On August 21, 1997 the parties entered into a settlement conference with the Family District Court judge which resulted in a decree of divorce on November 4, 1997. In order to prevent a Qualified Domestic Relations Order

(QDRO) from being prepared, which would have paid a small portion of Lupe's monthly retirement benefits to Janis, it was agreed that Lupe would pay Janis $1500 "as and for an equalization of the values of the marital portion of the pensions divided herein." Lupe was awarded as his sole and separate property his pensions with IATSE and Hilton Hotels. Janis was awarded as her sole and separate property her pension with IATSE. (App., *infra,* 34-36)

Lupe married Judy on November 30, 1997. On January 9, 1998, Lupe filed a countermotion to divide unadjudicated assets, claiming that the survivor benefits were still a part of Lupe's pension plans and that they were awarded to him in the divorce asserting that Janis's separate interest in the survivor benefits in the pension plans had a present day value of $55,539.00 and requested the court issue a QDRO "allowing him to transfer the beneficial rights to his present wife, Judy." The district court issued its Order of March 25, 1998, and found that "Only the people at the pension fund know who is right, so it is up to them. The court is not going to give the plaintiff (Lupe) the benefit of language that was not agreed upon." The court ordered, "[T]hat the QDRO is to be modified to redact the survivor annuity as being waived. [T]hat if the Plan agrees to change the beneficiary, it can." The court ordered Lupe's attorney to modify the QDRO he had prepared. (App., *infra,* 30-32) Lupe's attorney never prepared a modified QDRO as ordered by the court. Both IATSE and Hilton Hotels informed Lupe and his attorney that the plans would not honor the domestic relations order (DRO) since under the plans and ERISA the designation of Janis as the beneficiary of the QJSAs was irrevocable and any DRO under ERISA would not be a QDRO. (App., *infra,* 59-67)

Lupe changed attorneys. On November 2, 1998, Lupe filed a countermotion for establishment of a constructive trust on the basis of unjust enrichment in that Lupe was dispossessed of property that was awarded to him in the Decree of Divorce. Lupe died on April 15, 1999. The District Court issued its Order on April 16, 1999, ordering the administrators of Lupe's retirement plans with Hilton Corporation and IATSE to change the survivor beneficiary according to Lupe's directions; that if the administrators of Lupe's retirement plans cannot, or fail to, make this change the court will order the establishment of a constructive trust for the benefit of Lupe's designated beneficiary wherein the survivorship funds, if received by Janis, will be held in trust for receipt by Lupe's designated beneficiary. (App., *infra,* 24-29)

On April 28, 1999, Janis filed her *Motion to Amend Findings of Court and Its Order of April 16, 1999 (Nevada Rules of Civil Procedure 52(b)) and Motion for New Trial (NRCP 59).* On July 27, 1999, the district court issued its order requiring any pension money Janis received as survivor benefits be placed in a blocked account until the district court determines who is entitled to the funds. (App., *infra,* 41-44) After various motions and hearings the district court issued its Order of March 14, 2000 denying Janis's tolling motions (App., *infra,* 18-21) and its Order of May 31, 2000. (App., *infra,* 11-17) Janis filed a separate notice of appeal to each of these orders. The Nevada Supreme Court issued its *Order of Affirmance* on October 21, 2003 (App., *infra,* 1-8) and its *Order Denying Rehearing* on November 21, 2003. (App., *infra,* 45-46) On December 17, 2003, the Nevada Supreme Court issued its *Order Denying En Banc Reconsideration.* (App., *infra,* 9-10) The Nevada Supreme Court ruled that the Order of April 16,

1999, under ERISA was a QDRO and it included the survivor benefits as Lupe's sole and separate property.[1] (App., *infra,* 3)

Janis filed Chapter 13 bankruptcy on July 18, 2000 in case number BK-S 0015315-RCJ. The Bankruptcy Court ordered that all survivor pension funds received by Janis be placed in the registry of the court. Janis filed an *Application to Convert to Chapter 7 Proceeding* on January 26, 2004 with a hearing date of February 23, 2004. On February 3, 2004, the Bankruptcy Court agreed with the Nevada Supreme Court's *Order of Affirmance* and ordered that all the funds placed in the registry of the court by Janis be turned over to Judy's attorney, Marshal S. Willick.

REASONS FOR GRANTING THE PETITION

This Petition must be granted in order to provide authority to state and federal courts as to the effect of 29 U.S.C. §§1055(a)(1), (c)(1)(2), (c)(7)(A), (d)(1)(2), (f)(1)(2); 1056(d)(1)(3)(F)(i)(ii); and 1144(a), (c)(1) and whether state and federal courts can order a constructive trust of the proceeds of a QJSA for the benefit of a current spouse after the participant has designated his wife as beneficiary, retired and subsequently divorced. The Nevada order opens the floodgates for state and federal courts to rely upon this Order of Affirmance to deprive vested

[1] However, the Order of April 16, 1999 does not meet the mandates of the Retirement Equity Act of 1984 (REA) to be a QDRO. 29 U.S.C. §1056(d)(3)(C)(D). For an analysis of QDRO requirements see *Dorn v. International Broth. of Elec. Workers*, 211 F.3d 938 (5th Cir. 2000).

beneficiaries of QJSAs, which was not intended by Congress in enacting ERISA and the Retirement Equity Act of 1984 (REA).

THE ORDER BELOW IS CONTRARY TO THE PROVISIONS OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, (ERISA), PUBLIC LAW 93-406; 29 U.S.C. §1056(d)(1); 514(a) & (c); 29 U.S.C. §1144(a) & (c); THE RETIREMENT EQUITY ACT OF 1984 (REA), PUBLIC LAW 98-397; 29 U.S.C. §1055(a)(1) & (c)(1)(2), (c)(7)(A), (d)(1)(2); (f)(1)(2); 29 U.S.C. §1056(d)(3)(F)(i)(ii) OF THE LABOR CODE AND SUPPORTING LAW PERTAINING THERETO

ERISA, as originally enacted, contains a spendthrift provision which states that benefits provided under covered retirement pension plans may not be alienated or assigned. §1056(d)(1). The purpose of the spendthrift provision is to protect and secure the financial well-being of employees and their dependents. *Ablamis v. Roper,* 937 F.2d 1450, 1453-54 (9th Cir. 1991). However, ERISA was flawed in that it did not clearly delineate a spouse's interest in an employee's pension benefits. "The statutory confusion often left women who worked in the home and contributed significantly to the family's financial security without the ability to obtain any pension benefits upon their husband's death or upon divorce." *Id.* at 1453. Congress, therefore, enacted the Retirement Equity Act of 1984 ("REA"), Pub. Law 98-397, 98 Stat. 1426 (1984),

primarily for the purpose of safeguarding the financial security of widows and divorcees. *Id.*[2]

> [2] In the legislative history of the REA, it is noted that ERISA was amended to provide for greater equity under private pension plans for workers and their spouses . . . by taking into account changes in work patterns, the status of marriage as an economic partnership, and the substantial contribution to that partnership of spouses who work both in and outside the home.

Dickerson v. Dickerson, 803 F.Supp. 127, 130 (E.D.Tenn. 1992). (Footnote omitted.)

"The surviving spouse annuity and QDRO provisions, central to the dispute here, are part of the statute's mandatory participation and vesting requirements. These provisions provide detailed protections to spouses of plan participants. . . ." *Boggs v. Boggs,* 520 U.S. 833, 841 (1997). Janis asserts that federal law preempts and supersedes state law and requires the surviving spouse annuity to be paid to her as the sole beneficiary. *Id.* at 841.

> When ERISA was initially enacted in 1974, Surviving Spouse Benefits were payable to the surviving spouse only if the surviving spouse was married to the participant on both the date of the participant's retirement and the date of the participant's death. See 26 C.F.R. §1.401(a)-11(d)(3)(i)(ii)(iii) (1977). In 1984, however, the Retirement Equity Act (REA) amended ERISA's marriage requirement. Now, Surviving Spouse Benefits may be paid to a spouse who was married to the participant on the date of the participant's retirement, regardless of whether the

> spouse is married to the participant on the date of the participant's death. See 29 U.S.C.A. §§1055(a) and 1055(f) (noting that the joint and survivor annuity, with its Surviving Spouse Benefits, is the automatic form of payment for a participant who is married on the date of retirement). We find that the change in ERISA's marriage requirement is evidence that the Surviving Spouse Benefits vest in the spouse married to the participant on the date of retirement.

Hopkins v. AT & T Global Information Solutions Co., 105 F.3d 153, 156 (4th Cir. 1997).

Footnote 5, in *Hopkins* at page 156 reads: "For a spouse to receive Surviving Spouse Benefits, REA also requires that the spouse either be married to the participant for at least the one-year period prior to the participant's retirement, *see* 29 U.S.C.A. §1055(f)(1), or be married to the participant prior to the participant's retirement and for at least the one-year period prior to the participant's death. *See* 29 U.S.C.A. §1055(f)(2)." Also *see* 29 U.S.C. §1056(d)(3)(F)(i)(ii).

Footnote 6, in *Hopkins* at page 157 reads: "There remains the possibility of a subsequent spouse. However, because Surviving Spouse Benefits may not be paid to a spouse who marries a participant after the participant's retirement, *see* 29 U.S.C.A. §1055(f), there is no need to consider the interests of a subsequent spouse in determining whether the current spouse has a vested interest in the Surviving Spouse Benefits."

> ERISA's preemption section, 29 U.S.C. §1144(a), states that ERISA "shall supersede any and all State laws insofar as they may now or hereafter

relate to any employee benefit plan" covered by ERISA.

Egelhoff v. Egelhoff ex rel. Breiner, 532 U.S. 141, 121 S. Ct. 1754, 121 S. Ct. 1322, 1327 (2001).

The term, "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. 29 U.S.C. §1144(c)(1). The Nevada Supreme Court's order in approving the district court's imposition of a constructive trust on Janis of her QJSAs for the benefit of Lupe's current wife was preempted under 29 U.S.C. §§1056(d)(1) and 1144(a) and (c).

At the time of the divorce Lupe was retired and the QJSAs were no longer part of Lupe's ERISA retirement plans. They were vested in Janis. Had Lupe died, the QJSAs would not be part of Lupe's estate. He could not have bequeathed the QJSAs to Judy. The district court's ordering a constructive trust was preempted by 29 U.S.C. §1056(d)(1), which provides, "Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated." *Guidry v. Sheet Metal Workers Nat. Pen. Fund*, 110 S. Ct. 680, 685-688 (1990). "[W]hen Congress was adopting ERISA, it had before it a provision to bar the alienation or garnishment of ERISA plan benefits, and chose to impose that limitation only with respect to ERISA pension benefit plans, and *not* ERISA welfare benefit plans." *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 108 S. Ct. 2182, 2189, 100 L.Ed.2d 836, 837 (1988). "The view that the statutory restrictions on assignment or alienation of pension benefits apply to garnishment is consistent with applicable administrative regulations, with the relevant legislative history, and with the views of other federal courts. It is also consonant with other

statutory provisions designed to safeguard retirement income. We see no meaningful distinction between a writ of garnishment and the constructive trust remedy imposed in this case. That remedy is therefore prohibited by §206(d)(1) unless some exception to the general statutory ban is applicable." *Guidry* at 685. It is abundantly clear that the imposition of a constructive trust on Janis for the benefit of Judy is an alienation of the QJSA benefits.

In *Guidry,* the union and Guidry stipulated to a judgment for $275,000 after Mr. Guidry embezzled some $377,000 from the union and served a prison term for that crime. At the time of the divorce Janis had no monetary obligation to Lupe and the District Court found that Janis had not waived her rights to the QJSAs. (App., *infra,* 30-32) Other than the order for a constructive trust and the award of $15,000 attorney fees, neither Lupe nor his current wife, Judy, had obtained a judgment against Janis.

The Nevada Supreme Court ruled that ERISA does not preclude the imposition of a constructive trust after the benefits are distributed to a beneficiary according to the pension plan. Citing *Guidry v. Sheet Metal Workers Nat. Pension Fund,* 39 F.3d 1078, 1081 (10th Cir. 1994). However, as stated above that would be an alienation of the proceeds of the QJSA and against the mandates of 29 U.S.C. §1056(d)(1). *See U.S. v. Smith,* 47 F.3d 681 (4th Cir. 1995).

The Nevada Supreme Court concluded that "ERISA does not preempt an explicit waiver of interest by a nonparticipant beneficiary" of ERISA-regulated benefits (including the benefits of a QJSA), citing *Melton v. Melton,* 324 F.3d 941, 945 (7th Cir. 2003); and *Manning v. Hayes,* 212 F.3d 866, 871 (5th Cir. 2000), *cert. denied,* 532 U.S. 941 (2000).

Both of these cases pertain to life insurance benefits, not QJSAs. Both of these cases ruled that "[A]n attempted waiver by a designated beneficiary of an ERISA-regulated benefits plan be 'explicit, voluntary, and made in good faith' to be considered valid." *Melton,* at 945. The Nevada Supreme Court did not rule that there was an "explicit" waiver by Janis, yet approved the imposition of a constructive trust on her survivor benefits for the receipt by Judy. The Nevada Supreme Court ruled that once Lupe paid Janis the $1500 ("as and for an equalization of the values of the marital portion of the pensions divided herein") she had no more interest in his retirement plans, including the survivor benefits. The Nevada Supreme Court further ruled the imposition of a constructive trust after the benefits are distributed to Janis according to the pension plan and ERISA is not preempted by 29 U.S.C. §1056(d)(1). (App. *infra,* 6) Finally the Nevada Supreme Court agreed with the District Court that "Janis' retention of the pension benefits would be inequitable since Lupe was no longer married to Janis at the time of his death, and he specifically requested that Judy be named beneficiary of his survivor benefits." (App., *infra,* 7)

ERISA does preempt a waiver of the beneficiary's interest in a QJSA after the retirement of the participant. Common law is not employed after the designation of the beneficiary by the retired participant to effectuate the intent of the parties. Once the option has been selected by the participant and the participant retires, the selection becomes irrevocable and the QJSA becomes vested in the beneficiary. Once Lupe retired, October 1, 1992, his election of the Joint and Surviving Spouse Option became irrevocable and could not be changed through waiver by Janis. *Anderson v. Marshall,* 856 F. Supp. 604 (D.Kan.

1994); *Hopkins v. AT & T Global Information Solutions Co.,* 105 F.3d 153 (4th Cir. 1997); *Lasche v. George W. Lasche Basic Profit Sharing Plan,* 111 F.3d 863 (11th Cir. 1997); *Rivers v. Central and South West Corp.,* 186 F.3d 681 (5th Cir. 1999). After the participant retires the provisions of 29 U.S.C. §1056, with the exception of subsections (d)(1) and (d)(3)(F)(i)(ii), have no application to QJSAs.

The Nevada Supreme Court's interpretation of ERISA is that although Lupe designated Janis as the beneficiary of the QJSAs and was retired for five years prior to the divorce, the survivor benefits payable to Janis were "benefits payable with respect to a participant under a plan" and not vested in her. (App., *infra,* 5) "However, after carefully reviewing the overall framework of ERISA, especially the provisions governing joint and survivor annuities, we conclude that the Surviving Spouse Benefits vest in the participant's current spouse on the date the participant retires." *Hopkins v. AT & T Global Information Solutions Co.*, 105 F.3d 153, 156 (4th Cir. 1997).

> If a participant dies after the annuity starting date, the spouse to whom the participant was married during the one-year period ending on the annuity starting date is entitled to the survivor annuity under the plan whether or not the participant and spouse are married on the date of the participant's death.

Retirement Equity Act of 1984, P. L. 98-397, Senate Report (Finance Committee) No. 98-575, pp. 15-16, August 2, 1984. *See* 26 C.F.R. 1.401(a)-20(b)(3) Internal Revenue Code (Revised April 1, 1991)

In this case Lupe had retired and was not free to change his beneficiary designation of Janis. The instructions for employee benefit election provided: "*CHANGE OF BENEFIT ELECTION.* You may change or revoke your benefit election at any time before your pension payments have started. Your benefit election becomes irrevocable when you receive your first pension payment." (App., *infra,* 55) Lupe could not avoid this clear prohibition against post-retirement revocation or reelection by asserting that his ex-wife, Janis, "waived" her entitlement to benefits in a divorce decree which was filed long after any applicable election period. *See* 29 U.S.C. §1055(c)(1)(A)(i). *Anderson* at 607.

CONCLUSION

If the Nevada Supreme Court's interpretation of ERISA is allowed to stand, permitting courts to impose constructive trusts on the spouse who was married to the participant at the time of his retirement for the benefit of the current spouse, it will have an adverse effect on tens of thousands of ERISA pension plans throughout the United States.

For the foregoing reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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IN THE SUPREME COURT
OF THE STATE OF NEVADA

JANIS CARMONA, A/K/A JANIS KESTER, Appellants, vs. JUDY CARMONA, AS SUCCESSOR REPRESENTATIVE OF LUPE N. CARMONA, DECEASED, Respondent.	No. 35851
JANIS CARMONA, A/K/A JANIS KESTER, Appellant, vs. JUDY CARMONA, AS SUCCESSOR REPRESENTATIVE OF LUPE N. CARMONA, DECEASED, Respondent.	No. 36220

ORDER OF AFFIRMANCE

(Filed Oct. 21, 2003)

These are two consolidated appeals from several district court orders in the same district court case. The orders appealed from impose a constructive trust on survivor benefits, designate a successor representative, and award attorney fees.

Lupe Carmona was formerly married to appellant Janis Carmona. Before marring [sic] Janis, Lupe worked for the International Alliance of Theatrical Stage Employees (IATSE). During marriage, both Lupe and Janis worked for the Hilton Hotel Corporation. Lupe was eligible for pension benefits with IATSE and the Hilton Hotel Corporation and elected the qualified joint and survivor

annuity (QJSA) option for married couples on his pensions. Janis was listed as his survivor beneficiary for both plans. Lupe retired in 1992 and began receiving payments from his pensions.

In November 1997, Lupe and Janis divorced. In the divorce decree, Lupe was awarded his pensions as his separate property, but was ordered to pay Janis $1,500 for her marital portion of his pension.

After Lupe married respondent Judy Walkington shortly after his divorce from Janis, he tried to change the designation of his survivor beneficiary from Janis to Judy. However, representatives of both Hilton Hotel and IATSE informed Lupe that a change of beneficiary after commencement of retirement is prohibited. The Hilton Hotel representative added that the Employee Retirement Income Security Act (ERISA) prohibits such a change, unless a Qualified Domestic Relations Order (QDRO) "which waives the spouse's right to survivor benefits is served on the Plan." Accordingly, Lupe requested the district court to enter a QDRO ordering his pension plan administrators to grant his election of a new survivor beneficiary.

At first, the district court refused to issue a QDRO that changed the beneficiary. But subsequently, after Lupe's death, the district court found that the parties had agreed that Lupe's retirement benefits, including the survivor benefits, were his sole and separate property. The district court ordered the plan administrators to change the survivor beneficiary in accordance with Lupe's request, and if they did not, the district court stated that it "will Order the establishment of a Constructive Trust for the benefit of Lupe's designated beneficiary wherein the

survivorship funds, if received by Janis, will be held in trust for receipt by Lupe's designated beneficiary." The district court subsequently issued an order directing Janis to establish a constructive trust of the survivorship funds from Lupe's retirement plans for the benefit of Judy. Janis appeals.[1]

Janis's argument that the district court's first order refusing to impose a QDRO is res judicata has no merit. In the first order, the district court refused to issue the QDRO, but with additional information and arguments, the court could and did issue a QDRO. The first order was not final as is required for res judicata to apply. There was nothing inconsistent between the two orders, either in law or fact.

Janis's argument that the constructive trust unlawfully modifies the divorce decree is also without merit. The constructive trust does not modify the divorce decree since the district court concluded that in the divorce decree, Lupe's pension rights, including the survivor benefits, were awarded as his sole and separate property.

Janis argues that all district court orders entered during the period in which there was no designated successor representative for Lupe are void. Before a judgment may affect a deceased party's estate, the personal representative of the deceased party must be

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[1] Judy argues that Janis's appeal of the district court's April 16, 1999 order and constructive trust order of June 22, 1999, should be dismissed because Janis's notice of appeal of March 21, 2000, was untimely pursuant to NRAP 4. Judy's argument is without merit as Janis's motions were tolling motions under NRCP 52(b) and NRCP 59. *See* NRAP 4(a)(2).

substituted as a party.[2] Without such substitution, a judgment is voidable.[3] However, in this case, two months after Judy was substituted, the district court reconsidered all the orders issued during the time there was no successor representative. Therefore, the district court's orders are not void.

Janis's most important argument is that ERISA preempts the district court's orders and the constructive trust relating to ERISA-regulated benefits. Both of Lupe's pensions are regulated by ERISA, and interplay between ERISA and state law is not always clear. ERISA specifically provides that it "shall supercede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan."[4] ERISA also prohibits alienation of benefits other than to the designated participant or survivor beneficiary.[5] The Retirement Equity Act of 1984 provides an exception to the anti-alienation provisions of ERISA by allowing designation of an alternate payee through the issuance of a QDRO.[6] The statute defines a QDRO, in relevant part, as a domestic relations order "which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right

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[2] *Koester v. Estate of Koester*, 101 Nev. 68, 72, 693 P.2d 569, 572 (1985).

[3] *Id.*

[4] 29 U.S.C.S. § 1144(a) (Lexis 1998); *see also Villescas v. CNS Ins. Co.*, 109 Nev. 1075, 1080, 864 P.2d 288, 292 (1993); *Marcoz v. Summa Corporation*, 106 Nev. 737, 743, 801 P.2d 1346, 1350 (1990).

[5] 29 U.S.C.S. § 1056(d)(1) (Lexis 1998).

[6] 29 U.S.C.S. § 1056(d)(3).

to, receive all or a portion of the benefits payable with respect to a participant under a plan."[7]

The pension plans offered by Lupe's employers were required by ERISA to offer married employees survivor benefits.[8] One of ERISA's provides that the joint and survivor annuity form of benefit can be waived by the participant, Lupe, with the spouse's written consent in the 90-day period prior to the retirement date.[9] Here, Lupe retired and began receiving payments from his pensions in 1992, at which time he was still married to Janis. Therefore, it is Janis's contention that the survivor benefits irrevocably vested in her as Lupe's named beneficiary upon the date of his retirement.

Judy responds that Janis waived her survivor beneficiary benefits in the divorce decree. Federal courts disagree as to whether ERISA authorizes a claim of waiver, but a majority of federal circuits have concluded that "ERISA does not preempt an explicit waiver of interest by a nonparticipant beneficiary" of ERISA-regulated benefits.[10] Common law is employed to effectuate the clear intent of the parties as to who is the beneficiary.[11] "[W]ho is entitled to the proceeds of an ERISA plan . . . may

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[7] 29 U.S.C.S. § 1056(d)(3)(B)(i)(I).

[8] 29 U.S.C.S. § 1055(a)(1) & (b)(1) (Lexis 1998); *see also* Ronald J. Cooke, *ERISA Practice and Procedure* § 4:44, 4-174 (2d ed. 2002).

[9] 29 U.S.C. § 1055(c).

[10] *Melton v. Melton*, 324 F.3d 941, 945 (7th Cir. 2003); *see also Manning v. Hayes*, 212 F.3d 866, 871 (5th Cir. 2000), *cert. denied*, 532 U.S. 941 (2001).

[11] *Manning*, 212 F.3d at 871; *Silber v. Silber*, 786 N.E.2d 1263, 1268 (N.Y. 2003).

depend upon more than merely the plan documents, and may be properly defined by reference to . . . the particular facts of the case."[12]

In this case, the district court found that Janis agreed in the divorce action that Lupe would receive the entirety of his retirement plans upon paying her $1,500. Once Lupe paid Janis the $1,500, she had no more interest in his retirement plans, including the survivor benefits. The district court found that the survivor benefits were not an omitted asset in the divorce decree, but were contemplated by the parties and that each received the total benefit package of their respective pension plans. The district court's findings are supported by substantial evidence. Since the pension plan administrators would not recognize Lupe's change of beneficiary and payments were being made to Janis, the district court ordered that Janis hold the proceeds received in constructive trust for Judy.

Janis also argues that the imposition of a constructive trust relating to an employee benefit plan is preempted by ERISA. However, ERISA does not preclude the imposition of a constructive trust after benefits are distributed to a beneficiary according to the pension plan.[13] Additionally,

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[12] *Id.*

[13] *Central States, SE & SW Areas Pension v. Howell*, 227 F.3d 672, 678-79 (6th Cir. 2000) (holding that a constructive trust could be imposed on employee welfare plan benefits after distribution to beneficiary). The anti-alienation clause does "not . . . protect private pension benefits once paid to and received by the beneficiary." *Guidry v. Sheet Metal Workers Nat. Pension Fund*, 39 F.3d 1078, 1081 (10th Cir. 1994); *see also Emard v. Hughes Aircraft Co.*, 153 F.3d 949, 955 (9th Cir. 1998), *overruled on other grounds by Egelhoff v. Egelhoff*, 532 U.S. 141, 146, 151-52 (2001).

we agree with the Hawaii Supreme Court that ERISA does not govern our interpretation of the divorce decree:

> The resolution of competing claims involving such matters as alimony, child support, and property (including pension interests) accrued during a marriage is entirely with the province of state domestic relations law . . . ERISA's 'qualification' of such domestic relations orders is concerned solely with enabling the plan to fulfill its fiduciary duties by ensuring that its obligations are clear and its liabilities are kept within the bounds of its contract and federal law.[14]

A constructive trust may be imposed if: "(1) a confidential relationship exists between the parties; (2) retention of legal title by the holder thereof against another would be inequitable; and (3) the existence of such a trust is essential to the effectuation of justice."[15] In this case, there was a confidential relationship between Janis and Lupe, as they were previously married and Janis was designated as Lupe's survivor beneficiary. The district court found that Janis's retention of the pension benefits would be inequitable since Lupe was no longer married to Janis at the time of his death, and he specifically requested that Judy be named beneficiary of his survivor benefits. The pension plan administrators would not change the beneficiary because of formal plan requirements. A constructive trust is essential to effectuate the wishes of the plan participant. The district court's imposition of a constructive trust was proper.

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[14] *Torres v. Torres*, 60 P.3d 798, 817 (Haw. 2002).

[15] *Locken v. Locken*, 98 Nev. 369, 372, 650 P.2d 803, 805 (1982).

Janis disputes the district court's award of attorney fees of $15,000 to Judy as arbitrary and lacking a statutory basis. Pursuant to NRS 125.150(3), a district court has wide discretion in awarding attorney fees in an action for divorce when such fees are raised in the pleadings, and its determination will not be disturbed upon appeal absent abuse.[16] We have previously concluded that the district court has discretion to award attorney fees in post-divorce proceedings.[17] Upon a review of the various and extensive proceedings, we determine that the district court did not abuse its discretion in granting attorney fees.

We ORDER the judgment of the district court AFFIRMED.

/s/ Shearing, J.

/s/ Leavitt, J.

/s/ Becker, J.

cc: Hon. Robert E. Gaston, District Judge,
Family Court Division
William E. Freedman, Chtd.
Marshal S. Willick
Clark County Clerk

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[16] *Burr v. Burr*, 96 Nev. 480, 482 611 P.2d 623, 624 (1980).

[17] *Halbrook v. Halbrook*, 114 Nev. 1455, 1460-61, 971 P.2d 1262, 1266 (1998).

IN THE SUPREME COURT OF THE
STATE OF NEVADA

JANIS CARMONA, A/K/A JANIS KESTER, Appellant, vs. JUDY CARMONA, AS SUCCESSOR REPRESENTATIVE OF LUPE N. CARMONA, DECEASED, Respondent.	No. 35851
JANIS CARMONA, A/K/A JANIS KESTER, Appellant, vs. JUDY CARMONA, AS SUCCESSOR REPRESENTATIVE OF LUPE N. CARMONA, DECEASED, Respondent.	No. 36220

ORDER DENYING EN BANC RECONSIDERATION

(Filed Dec. 17, 2003)

Having considered the petition on file herein, we have concluded that en banc reconsideration is not warranted. NRAP 40A. Accordingly, we

ORDER the petition DENIED.

Agosti, C.J.
Agosti

Shearing, J.
Shearing

Rose, J.
Rose

Leavitt, J.
Leavitt

Becker, J.
Becker

Maupin, J.
Maupin

Gibbons, J.
Gibbons

cc: Hon. Robert E. Gaston, District Judge, Family Court Division
Hon. Steven E. Jones, District Judge, Family Court Division
William E. Freedman, Chtd.
Marshal S. Willick
Clark County Clerk

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DISTRICT COURT
FAMILY DIVISION
CLARK COUNTY, NEVADA

LUPE N. CARMONA, Deceased, through his Successor Representative, JUDY CARMONA, Plaintiff, vs. JANIS CARMONA, Defendant.	CASE NO: D 181580 DEPT NO: F DATE OF HEARING: 5/1/00 TIME OF HEARING: 10:00 a.m.

NUNC PRO TUNC ORDER

(Filed May 31, 2000)

On May 1, 2000, the continuation of a hearing begun March 13, 2000, was held before the Honorable Judge Robert E. Gaston, on PLAINTIFF'S "COUNTERMOTION FOR ATTORNEY'S FEES" as to all three motions, and DEFENDANT'S REQUEST FOR AN EVIDENTIARY HEARING. This Nunc Pro Tunc Order is to correct the courts [sic] record as to the date and time of hearing and the court hearing this matter.

Plaintiff, Successor Representative for Plaintiff LUPE CARMONA, JUDY CARMONA ("Judy"), was represented by Marshal S. Willick, Esq., of the LAW OFFICE OF MARSHAL S. WILLICK, P.C., and Defendant JANIS KESTER fka JANIS CARMONA, ("Janis"), was represented by her attorney, William E. Freedman, Esq., of the LAW OFFICE OF WILLIAM E. FREEDMAN, CHARTERED.

In the interval between the two hearing dates, Mr. Freedman filed a motion for a Stay based on various grounds, involving his appeal filing, his claim of *res judicata*, and others. Mr. Freedman reiterated his motion orally at the beginning of proceedings; the Court addressed that matter first.

The Court noted that normally when a case is appealed there is an automatic "stay" in place, in a manner of speaking, insofar as the District Court loses jurisdiction to consider matters that are on appeal in the Supreme Court. However, the District Court does not lose the ability to enforce previous orders of the Court, and this is what this hearing was about, so Mr. Freedman's motion for stay would be denied.

Mr. Freedman requested a statement for specific reasons for the denial of his motion to stay. The Court stated that the reason for denying the Stay is that this is a hearing on the enforcement of a previous court order, that the Supreme Court allows this court to carry on its business in the enforcement of its orders. The Court noted that it had the power to delay hearing the matters set for hearing this date, but observed that it would be judicially uneconomical for the court to do so; specifically, the Court found that if this hearing was delayed, the parties would have to go through the entire appellate process, and if

Defendant was not entirely successful on all points, they would return to this court to get a ruling on the Attorney's Fees and Contempt Issues which are now currently before the court, possibly leading to a second round of appeals.

As to *res judicata*, the Court clarified any ambiguity in its prior Orders by stating the Court had, from the beginning of these proceedings, and as intended in the Decree of Divorce, ruled that LUPE had, as his sole and separate property, his entire retirement, including all attributes and all the benefits connected with that retirement; everything that had to do with that retirement was LUPE's. Likewise, everything that had to do with JANIS' retirement belonged to Janis, to do with as she pleased. That arrangement was agreed upon by the parties, and was ordered by this Court. It was only *after* that agreement and order, that Janis came back and said "I want my part of Lupe's retirement (the survivorship benefits)," and the Court's response was that because of the fact that Lupe had already started being paid by the pension plan, the Court did not see any way in which to make the plan change, even though that was the intent of the Decree. It was later still explained to the Court that there was a way in which the court could legally enforce its previous order by the establishment of constructive trust, which the Court ordered.

In other words, the Court **FINDS** no basis in application of the doctrine of *res judicata* to stay these proceedings, because this Court has not changed its position that the retirement was Lupe's and still is Lupe's. In other cases, parties have not provided this Court with a means for bringing its orders into effect once a beneficiary had started receiving the benefit; in this case, counsel did so, and this mechanism allowed Lupe to receive what the

Court had already said was his. Further, that it was never an intent of this Court for anyone but Lupe or those intended through his estate to get the money.

Mr. Freedman's oral request for a Continuance based on various grounds was denied.

The Court has reviewed the papers and pleadings on file herein, heard extensive oral argument of counsel, and been fully advised of the facts and circumstances surrounding this case. Good cause appearing therefor:

IT IS HEREBY ORDERED that Defendant is held in contempt of this Court for failure to abide by the Court's Orders of April 16, 1999, June 22, 1999 and January 6, 2000, directing that all funds to be received by Defendant from the pension plans of Lupe N. Carmona be placed in Constructive Trust. Specifically, the Court Finds:

1. That the Court had required *all* monies coming from the pension plans to be deposited into the trust account it had ordered to be set up, that Defendant refused to follow that Order and did not deposit the funds as ordered and that each time she refused to deposit the full amount ordered was contemptuous.

2. That the Court required the monies to be placed in an account to be set up by the parties, that the Defendant chose not to comply, which was evidenced by her October 27th letter, and that this was contemptuous as well.

3. That while Defendant has the right to consult with other counsel in whatever regard she wants, which intent she evidenced by her Nov. 9th letter, she must still abide with the Court's Orders

while she does so, and her failure to do so is contemptuous.

4. That the Defendant, when directed to deposit the funds to the account chose to divert a portion of the monies for her own use and benefit (tax withholdings), and has gone so far as to increase that amount being withheld form [sic] the amount she was ordered to deposit and paid to the Internal Revenue Service by I.A.T.S.E. pension plan. That this decision to direct withholdings from the payment stream was made outside of the Court's Order, by Defendant unilaterally, and without seeking leave of Court to do so, and was contemptuous.

5. That the Defendant further has unilaterally increased that withholding amount in continuing refusal to abide by the Court's Order, and that this is contemptuous.

IT IS FURTHER ORDERED that Defendant is to sign any and all documents to remove the tax deduction currently in place on the pension funds of Lupe N. Carmona prior to leaving this court. [Janis signed page one of the form, directing that no tax withholdings be taken out, in open Court].

IT IS FURTHER ORDERED that Plaintiff shall forthwith remit to the Trust account the entire sum she has caused to be withheld from deposit to that account to date, which amount was represented to be believed to be $800.00.

IT IS FURTHER ORDERED that the Defendant shall forthwith remit to the Trust account the interest and fees incurred due to the failure of Defendant to timely

deposit the money's [sic] as ordered by the Court, in the respective amounts of $17.48 and $30.00, respectively. [Defendant agreed that this would be done].

IT IS FURTHER ORDERED that Defendant Janis Kester (fka Janis Carmona) is ordered to pay a total of $15,000.00 in Attorney's Fees and Cost in defense of Motions decided by this Court on April 16, 1999, June 22, 1999 and January 6, 2000, and these contempt proceedings. That sum is reduced to judgment as of May 1, 2000 and is collectible by all legal means.

IT IS FURTHER ORDERED that any and all monies received, to date or prospectively, by Judy Carmona regarding Lupe Carmona, or the estate of Lupe Carmona, to expressly include any and all monies received from I.A.T.S.E. or the Hilton Hotel Corporation as and for the retirement benefits or survivor benefits attributable to the pension plans of Lupe Carmona with I.A.T.S.E. or the Hilton Hotel Corporation shall continue to be placed in the Court-established trust account.

IT IS FURTHER ORDERED that Mr. Willick should prepare the Order from these proceedings, provide the same to Mr. Freedman for review and signature, which should be prompt, and that the party receiving any order from this Court should promptly give notice of entry thereof to the opposing attorney.

DATED this 22nd day of May 2000.

ROBERT E. GASTON
DISTRICT COURT JUDGE

Submitted by:

LAW OFFICE OF
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/s/ Robert Cerceo
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Attorney for Plaintiff

Approved as to form
and content by:

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CHARTERED

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DISTRICT COURT
FAMILY DIVISION
CLARK COUNTY, NEVADA

LUPE N. CARMONA, Deceased, through his Successor Representative, JUDY CARMONA, Plaintiff, vs. JANIS CARMONA, Defendant.	CASE NO: D 181580 DEPT NO: F DATE OF HEARING: 2/29/00 TIME OF HEARING: 08:00 a.m.

ORDER

(Filed Mar. 14, 2000)

On February 29, 2000, a hearing was held before the above-designated court on DEFENDANT'S: (1) "MOTION AND NOTICE OF MOTION TO AMEND FINDINGS OF COURT AND ITS ORDER OF APRIL 16, 1999 (NRCP 52(b)) AND MOTION FOR NEW TRIAL (NRCP 59)," (2) "MOTION AND NOTICE OF MOTION TO AMEND OR RESCIND ORDER ESTABLISHING CONSTRUCTIVE TRUST (FILED JUNE 22, 1999) (NRCP 52(b))," (3) "MOTION AND NOTICE OF MOTION TO

AMEND ORDER OF JANUARY 6, 2000 (NRCP 52(b) AND NRCP 59(e))" and PLAINTIFF'S "COUNTERMOTION FOR ATTORNEY'S FEES" as to all three motions, and DEFENDANT'S REQUEST FOR AN EVIDENTIARY HEARING.

Plaintiff, Successor Representative for Plaintiff LUPE CARMONA, JUDY CARMONA ("Judy"), was represented by Marshal S. Willick, Esq., of the LAW OFFICE OF MARSHAL S. WILLICK, P.C., and Defendant JANIS CARMONA-KESTER, ("Janis"), was represented by her attorney, William E. Freedman, Esq., of the LAW OFFICE OF WILLIAM E. FREEDMAN, CHARTERED.

The Court has reviewed the papers and pleadings on file herein, heard extensive oral argument of counsel, and been fully advised of the facts and circumstances surrounding this case. Good cause appearing therefor:

IT IS HEREBY ORDERED that Defendant's Motion to Amend Findings of Court and its Order of April 16, 1999 (NRCP 52(b)) is denied.

IT IS FURTHER ORDERED that Defendant's Motion for New Trial (NRCP 59) is denied.

IT IS FURTHER ORDERED that Defendant's Motion to Amend or Rescind Order Establishing Constructive Trust (filed June 22, 1999) (NRCP 52(b)) is denied.

IT IS FURTHER ORDERED that Defendant's Motion to Amend the Order of January 6, 2000 (NRCP 52(b) and NRCP 59(e)) is denied.

IT IS FURTHER ORDERED that Defendant's Request for an Evidentiary Hearing is granted and is on calendar for March 13, 2000.

IT IS FURTHER ORDERED that the Court's Order most recently re-stated on January 6, 2000 (requiring that any and all monies received, to date or prospectively, by either Janis Carmona or Judy Carmona regarding Lupe Carmona, or the estate of Lupe Carmona, to expressly include any and all monies received from I.A.T.S.E. or the Hilton Hotel Corporation as and for the retirement benefits or survivor benefits attributable to the pension plans of Lupe Carmona with I.A.T.S.E. or the Hilton Hotel Corporation shall be placed in an interest-bearing blocked trust account) shall remain in effect. Any remaining questions as to the disposition of the money held in the accounts shall be resolved at the time of the evidentiary hearing scheduled for March 13, 2000, at 3:00 p.m.

IT IS FURTHER ORDERED that Plaintiff's request for a formal Order (to be filed in the probate matter and wherever else necessary) stating that Defendant Janis is not entitled to Attorney's Fees for any portion of the litigation in this matter, is granted.

IT IS FURTHER ORDERED that Plaintiff is the prevailing party herein and entitled to an award of fees as requested in the moving papers. An order for Attorney's Fees will be done under separate cover after the Court has reviewed the billing information to be provided by Marshal S. Willick, Esq., as requested by the Court during the hearing.

IT IS FURTHER ORDERED that Mr. Willick should prepare the Order for this hearing, and submit to

Mr. Freedman for counter-signature, submitting the Order without such signature if Mr. Freedman does not sign off within five days. Should Mr. Freedman believe that the proposed Order does not comport with this Court's ruling, he can submit an alternative proposed order on his own. The party securing a signed Order shall promptly give notice of entry thereof to the other party through counsel.

DATED this 14 day of March 2000.

Robert E. Gaston
DISTRICT COURT JUDGE

Submitted by:

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DISTRICT COURT
FAMILY DIVISION
CLARK COUNTY, NEVADA

LUPE CARMONA, Plaintiff, vs. JANIS CARMONA, Defendant.	) CASE NO. D181580) DEPT. F)) DATE:) TIME:)))

ORDER ESTABLISHING CONSTRUCTIVE TRUST

(Filed Jun. 22, 1999)

Upon application of plaintiff, Lupe Carmona, by and through his attorney, Marshal S. Willick, Esq. of the LAW OFFICE OF MARSHAL S. WILLICK, P.C., and good cause appearing therefor;

IT IS HEREBY ORDERED that order [sic] Janis Carmona establish a Constructive Trust for the benefit of Lupe Carmona's designated beneficiary, Judy Carmona, wherein the survivorship funds from Lupe Carmona's retirement plans with Hilton Corporation and IATSE, if received by Janis Carmona, will be held in trust for receipt

by Lupe Carmona's designated beneficiary, as stated in his Last Will and Testament, Judy Carmona.

IT IS FURTHER ORDERED that Janis Carmona provide the administrators of Lupe Carmona's retirement plans with Hilton Corporation and IATSE an authorization for direct deposit into the Constructive Trust, with a provision that said authorization is to be irrevocable.

IT IS FURTHER ORDERED that Janis Carmona provide Lupe Carmona's counsel with all documentation to ensure that the Constructive Trust properly designates Judy Carmona as Lupe Carmona's designated beneficiary, and to ensure that Judy Carmona will receive all the survivor beneficiary funds from Lupe Carmona's retirement plans with Hilton Corporation and IATSE deposited into the Constructive Trust.

DATED this 22 day of ~~May~~ June, 1999.

Robert E. Gaston
DISTRICT COURT JUDGE

Submitted by:
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DISTRICT COURT
FAMILY DIVISION
CLARK COUNTY, NEVADA

LUPE CARMONA, Plaintiff, vs. JANIS CARMONA, Defendant.	CASE NO: D181580 DEPT. F Date of Hearing: 12/14/98 Time of Hearing: 11:00 a.m.

ORDER

(Filed Apr. 16, 1999)

The Court entertained the "Ex Parte Motion for Order to Show Cause" brought by Defendant, Janis Kester, formerly Janis Carmona, (Janis), and "Countermotion for Permission for Lupe to Sell the House at a Reasonable Price, and for Establishment of Constructive Trust" brought by Plaintiff Lupe Carmona (Lupe). Lupe was not present and represented by Marshal S. Willick, Esq. of The Law Office of Marshal S. Willick, P.C., and Janis was present and represented by William E. Freedman, Esq.

After taking the matter under submission, and the Court being fully apprised of the facts, circumstances and issues,

The Court finds as follows:

1. On August 21, 1997, the Court, at the request of the parties, participated in a settlement conference. In an attempt to resolve issues prior to trial, the parties, with assistance of counsel and the Court, meticulously negotiated the issues remaining in the case.

2. Of the items negotiated, two issues are presently before the Court – the sale of the house in Hollister, Missouri, and survivor beneficiary interest in Lupe's retirement plans.

3. The Decree of Divorce (Decree) entered on November 4, 1997, states at page 4, that:

> [T]he parties' residence at Potential Drive, Hollister, Missouri shall be placed on the market for sale with a mutually agreed broker, at a mutually agreed listing price. Each party will do everything that is reasonable to sell the property. Upon the sale of the residence, the proceeds of the sale shall be divided evenly. Pending sale, Plaintiff shall have exclusive possession of the residence.

4. In her motion, Janis contends Lupe is purposefully avoiding the sale of the home and is in violation of the Decree. Janis wants the Court to hold Lupe in contempt of Court for his failure to "do everything that is reasonable to sell the property." Both parties agreed to a listing price of $144,000.

5. There appears to have been at least two offers before the parties. On July 1, 1998, there was a purported offer of $125,000 less $10,000 for certain repairs and expenses. The parties agree that Janis rejected that offer.

6. On August 3, 1998, there was an offer of $137,000. Janis signed her name agreeing to accept the offer. Lupe did not accept the offer, but made a counter-offer for $144,000. In the meantime, Lupe apparently leased the property.

* * *

8. Neither party has violated the Court's order to the degree of a contemptuous action.

9. Lupe has two retirement plans (one with Hilton Corporation and the other with IATSE), and Janis has one (with the Stagehand Union). During the August, 1997, settlement conference counsel determined the value of Lupe's retirement was approximately $3,000 more than the value of Janis' retirement.

10. The parties agreed Lupe would keep his retirement plans as his sole and separate property and Janis would keep her plan as her sole and separate property. According to the agreement, Lupe would pay Janis one-half of the difference. That is, Lupe would pay Janis $1,500 for her community property interest in his retirement plans. *See* Decree, pp. 2-3. Lupe paid Janis the $1,500.

11. Lupe remarried and attempted to name his new wife as a survivor beneficiary on his retirement plans only to find out he was precluded from doing so because he had already drawn from the plans.

12. Lupe requests the Court to direct an Order to both retirement plan administrators to allow him to remove Janis as the survivor beneficiary and add his new wife. Janis objects to the removal of her name and claims interest as the survivor spouse on the plans. Lupe argues that to allow Janis to remain on the plans as his survivor beneficiary would be in violation of the Agreement and would unjustly enrich Janis.

13. There is no question the parties agreed they would each maintain their own retirement as their sole and separate property. This means to the Court they have the right to modify or adjust their respective plans in any way the plan administrators allow under their own rules. This Court so ruled in a previous hearing on this issue. That is, that if he were allowed to do so, Lupe could change the survivor beneficiary.

14. The issue that has recently arisen is that the administrators will not change the survivor beneficiary unless directly ordered to do so by the Court.

15. For consideration before the Court is whether the survivor benefits were an omitted asset or part of the distribution in the Decree. Although the survivor benefits were not specifically discussed during the settlement conference, it appears both parties were aware of their existence. Janis was aware and conversant about every detail in Lupe's retirement plans.

16. During the settlement conference both parties agreed Lupe would receive the entirety of his plans upon payment to Janis of $1,500. At that time, Janis did not assert that her interest as survivor beneficiary must be maintained. Accordingly, it is the opinion of the Court that Janis conceded that Lupe would receive every

aspect of his retirements, just as she received every aspect of hers.

17. The survivor benefits of Lupe's retirement plans are not an omitted asset, but were contemplated by the parties inherently in their discussion of their respective plans.

18. If Janis were to receive the survivor benefits against Lupe's wishes it would be in violation of the Agreement made by the parties and the Decree, and Janis would be unjustly enriched.

Therefore, good cause appearing,

IT IS THEREFORE ORDERED that Janis' motion to hold Lupe in contempt of court is denied.

IT IS FURTHER ORDERED that the administrators of Lupe's retirement plans with Hilton Corporation and IATSE change the survivor beneficiary according to Lupe's directions.

IT IS FURTHER ORDERED that if the administrators of Lupe's retirement plans cannot, or fail to make this change, the Court will Order the establishment of a Constructive Trust for the benefit of Lupe's designated beneficiary wherein the survivorship funds, if received by Janis, will be held in trust for receipt by Lupe's designated beneficiary.

DATED this 16th day of ~~February~~ April, 1999.

/s/ Robert E. Gaston
DISTRICT COURT JUDGE
ROBERT E. GASTON

Submitted by:

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DISTRICT COURT
CLARK COUNTY, NEVADA

LUPE N. CARMONA, Plaintiff,		
v.		
JANIS CARMONA, Defendant.	CASE NO.	D 181580
	DEPARTMENT	F

ORDER

(Filed Mar. 25, 1998)

Date of hearing: January 13, 1998

Time of hearing: 10:00 a.m.

The matter of the defendant's *Order to Show Cause* having come on for hearing before the court January 13, 1998, at 10 a.m.; William E. Freedman, Esquire, appearing for and with the defendant, Janis Kester (formerly Carmona); Radford J. Smith, Esquire, appearing for and with the plaintiff, Lupe Carmona; Judy Walkington Carmona being present in the courtroom; and it appearing to the court that the survivor benefits were not addressed in the settlement documents or the decree.

It also appeared to the Court that the plaintiff held up money that was agreed to be divided because the defendant refused to sign a QDRO and, thus the court finds that the plaintiff did not act in good faith. The court had ordered by the *Decree of Divorce* of November 4, 1997, that the monies were to be transferred within 30 days, which monies were not transferred. Plaintiff cannot hold up orders of the Court.

The Court further finds that a QDRO was submitted by the plaintiff, the Court has reviewed the same, and requires that the QDRO be revised. Only the people at the pension fund know who is right, so it is up to them. The court is not going to give the plaintiff the benefit of language that was not agreed upon. Therefore, the QDRO should be modified to redact the survivor annuity as being waived. If the pension allows plaintiff to change the survivor benefit over defendant's objection, that is their call.

IT IS HEREBY ORDERED that the plaintiff pay to the defendant $1,500 for attorney's fees for acting in bad faith, plus interest at the legal rate at the time the money was due.

IT IS FURTHER ORDERED that the QDRO is to be modified to redact the survivor annuity as being waived.

IT IS FURTHER ORDERED that to be consistent with the settlement and decree the language of the QDRO at page 2, paragraph 5 under the title "No Alternate Payee Award" is to be changed to state as follows: "No portion of the periodic benefits of the Participant's pension under the Plan is awarded by the Order to the Alternate Payee." The Second sentence of that paragraph is redacted.

IT IS FURTHER ORDERED that the language of the QDRO under the section "Payment" is to be changed to state as follows: "The Participant is awarded, as his own separate property, his full, unreduced pension benefit, restored to a lifetime basis for him under the Plan."

IT IS FURTHER ORDERED that if allowed by the Plan, the Plan shall make available the appropriate forms for the Participant to elect a new beneficiary to replace the Alternate Payee.

IT IS FURTHER ORDERED that plaintiff and defendant are required to sign the amended QDRO, transfer titles, and sign documents transferring titles and monies.

IT IS FURTHER ORDERED that if the Plan agrees to change the beneficiary, it can.

IT IS FURTHER ORDERED that William E. Freedman, Esquire is to prepare the Order.

IT IS FURTHER ORDERED that Radford J. Smith, Esquire is to modify the QDRO and allow for input from Mr. Freedman and the Plan.

DATED this 25th day of March, 1998.

ROBERT E. GASTON
DISTRICT JUDGE

Submitted by:

/s/ W. E. Freedman
WILLIAM E. FREEDMAN, CHARTERED
Nevada Bar #110
411 South Sixth Street
Las Vegas, Nevada 89101
Attorney for defendant

DECD
RADFORD J. SMITH, CHARTERED
RADFORD J. SMITH, ESQ.
Nevada State Bar #002791
3016 W. Charleston Blvd., Suite 195
Las Vegas, Nevada 89102
(702) 822-1075
Attorney for Lupe Carmona

DISTRICT COURT
CLARK COUNTY, NEVADA

LUPE N. CARMONA, Plaintiff, vs. JANIS CARMONA, Defendant.	CASE NO. D181580 DEPT. B **FAMILY DIVISION** DATE OF HEARING: August 21, 1997 TIME OF HEARING: 1:30 p.m.

DECREE OF DIVORCE

(Filed Nov. 4, 1997)

The above-entitled action coming on regularly to be heard before the above-entitled Court, the Honorable Judge Robert Gaston presiding, Plaintiff having filed his Complaint and being present and represented by Radford J. Smith, Esq. of the firm Radford J. Smith, Chartered, the Defendant being present and having filed her Answer through her attorney of record William Freedman, Esq., the court having heard the testimony of witnesses sworn in open court, and having heard the stipulation of the parties read into the record, the court FINDS AND ORDERS as follows:

The Court has complete jurisdiction in the premises, both as to the subject matter thereof as well as the parties thereto; that the Defendant is now, and has been, an actual and bona fide resident of the County of Clark, State of Nevada, and has been actually domiciled therein for more than six weeks immediately preceding this action; and the Court has found sufficient evidence from the documentation presented in the file to attest to the residency of the Defendant.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the bonds of matrimony heretofore existing between Plaintiff, LUPE CARMONA, and Defendant, JANIS CARMONA, be, and they hereby are, wholly dissolved, and that said parties, and each of them, are hereby restored all the rights and privileges of single, unmarried persons.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED neither party shall pay spousal support to the other, and that each party waives and terminates any and all right to alimony.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that both parties sign all documents and perform all acts necessary to effectuate this order and to transfer the properties involved herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff shall be awarded the following items of community property as his sole and separate property:

1. Lot and residence located on 7928 Wishing Well Drive, Las Vegas, Nevada;

2. Lot and residence located on 4208 Sheppard Drive, Las Vegas, Nevada.

3. Great Southern Bank account in the name of Plaintiff and Judy Walkington, account number 35-*****308;

4. Great Southern Bank account in the name of Plaintiff and Judy Walkington;

5. Plaintiff's pension with Stage Hands Union, I.A.S.T.E.; [sic]

6. Plaintiff's pension with Carpenter's Union;

7. Plaintiff's pension with the Hilton Hotel Pension Fund;

8. Any and all proceeds, approximately $153,000.00, from Plaintiff's lawsuit against U.S. Gypsum.;

9. Wells Fargo account with an approximate balance of $300.00

10. 1976 Chevrolet truck; and

11. Clothing, effects and jewelry in his possession.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant shall be awarded the following items of community property as her sole and separate property:

1. Lot and residence located at 1902 Old Mill Lane, Henderson, Nevada, owned jointly with Patrick Callahan.

2. Clothing, effects and jewelry in her possession.

3. 1989 Toyota Cressida automobile;

4. Any and all interest of Defendant in Intel Stock,

5. Any and all interest of Defendant in Merck and Company stock;

6. Any and all interest of Defendant in CitiCorp.;

7. Any and all interest of Defendant in Long Island stock;

8. Any and all interest of Defendant in Nevada Power Company stock owned in conjunction with Patrick Callahan;

9. Charles Schwab account in the name of Defendant, approximate balance $4,000.00;

10. Pension account in the name of Defendant with the Stagehand Union;

11. Nevada Power Company stock held jointly with Lupe Carmona, approximate value of $1,500.00.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED within thirty (30) days of the entry of this Decree of Divorce, Plaintiff shall pay to Defendant the sum of $1,500.00 as and for an equalization of the values of the marital portion of the pensions divided herein.

IT IS FURTHER ORDERED ADJUDGED AND DECREED within thirty (30) days of the entry of this Decree of Divorce, Plaintiff shall pay to Defendant the sum of $24,100.00 as and for her portion of the marital interest in the lot and residence located on Wishing Well Drive, Las Vegas, Nevada.

IT IS FURTHER ORDERED ADJUDGED AND DECREE that Plaintiff maintain the debt associated with the Wishing Well residence. Plaintiff will maintain the debt associated with the Hollister, Missouri residence pending sale. The debt associated with the Shepard

property to be maintained through the rental with Plaintiff being responsible for the debt pending the decision to sell the property and through the time of sale.

IT IS FURTHER ORDERED ADJUDGED AND DECREED the lot and residence located on Sheppard Ave., Las Vegas, Nevada shall be placed upon the market for sale, and Defendant shall receive $14,000.00 from the proceeds of that sale as compensation for her marital interest.

IT IS FURTHER ORDERED ADJUDGED AND DECREED that the parties' residence at Potential Drive, Hollister, Missouri shall be placed on the market for sale with a mutually agreed broker, at a mutually agreed listing price. Each party will do everything that is reasonable to sell this property. Upon the sale of that residence, the proceeds of the sale shall be evenly divided. Pending sale, Plaintiff shall have exclusive possession of the residence.

IT IS FURTHER ORDERED ADJUDGED AND DECREED that Plaintiff shall pay to Defendant, within thirty (30) days of the date of the entry of this Decree of Divorce, $11,000.00 from his Ozark Mountain Bank IRA. Said payment shall be made to a qualified plan or other account at the directions of Defendant. If Defendant fails to direct an account to which her portion of the IRA should be paid, Plaintiff shall pay the $11,000.00 referenced above directly to Defendant.

IT IS FURTHER ORDERED ADJUDGED AND DECREED that the Certificate of Deposit with Bank of America in [sic] approximate sum of $26,000.00, which CD was funded with the proceeds of the San Simeon residence sale, shall be divided equally between the parties.

IT IS FURTHER ORDERED ADJUDGED AND DECREED that the parties [sic] joint account at Merrill Lynch shall be divided as follows: $23,000.00 to Plaintiff, and $12,000.00 to Defendant. If the account has a value in excess of $35,000.00, any amount over and above that figure shall be divided evenly between the parties; if the value is less than $35,000.00, that amount shall be deducted from the portion of the account to be distributed to Defendant.

IT IS FURTHER ORDERED ADJUDGED AND DECREED that the parties' furniture located at the Hollister residence shall be divided as follows:

Defendant shall prepare two lists containing the entirety of the furniture. Plaintiff shall have the right to choose one of the two lists. The property on the list chosen by Plaintiff shall be retained by Plaintiff as his sole and separate property. The property on the remaining list shall be the sole and separate property of Defendant, and Defendant shall have the burden of transporting that property from Hollister, Missouri to the location of her choice.

IT IS FURTHER ORDERED ADJUDGED AND DECREE [sic] that the Chase Manhattan MasterCard with an approximate balance of $13,400.00 and the First Union Visa with an approximate balance of $2,700.00 [sic] to be assigned to the Plaintiff and Plaintiff [sic] to indemnify and hold the Defendant harmless therefrom.

IT IS FURTHER ORDERED ADJUDGED AND DECREE [sic] that the I.A.T.S.E. MasterCard with an approximate balance of $2,300.00 and the Chase Visa with an approximate balance of $7,000.00 and the debt to Defendant's father of approximately $12,500.00 [sic] to be

assigned to the Defendant and Defendant [sic] to indemnify and hold Plaintiff harmless therefrom.

IT IS FURTHER ORDERED ADJUDGED AND DECREED that Defendant shall be granted as her sole and separate property the shotgun that was given to her as a gift by Plaintiff and four (4) handguns that were given to her as gifts by her father. Plaintiff is informed and believes that these guns are in the possession of Regis Clunan. Plaintiff shall be entitled to retain as his sole and separate property any remaining guns owned by the parties.

IT IS FURTHER ORDERED ADJUDGED AND DECREED that the certain property of the parties is held in the Carmona Family Trust which party is a co-trustee. The parties shall take all steps necessary to transfer the property contained in that trust out of trust to the parties individually consistent with the terms of this Decree.

IT IS FURTHER ORDERED ADJUDGED AND DECREE [sic] that both parties shall bear their own attorney's fees and costs.

IT IS FURTHER ORDERED ADJUDGED AND DECREE [sic] that Defendant is restored to her former name of Janis Dee Kester.

IT IS SO ORDERED.

Dated this 29 day of Oct., 1997

GLORIA S. SANCHEZ
DISTRICT COURT JUDGE
for ROBERT E. GASTON

Respectfully submitted,
RADFORD J. SMITH, CHARTERED

/s/ Radford J. Smith
RADFORD J. SMITH, ESQ.
Nevada Bar No. 002791
3016 West Charleston Blvd., Suite 195
Las Vegas, Nevada 89102
Attorney for Plaintiff

Approved as to form and content,

/s/ W. E. Freedman
WILLIAM FREEDMAN, ESQ.
Nevada Bar No. 000110
411 S. Sixth St.
Las Vegas, Nevada 89101
Attorney for Defendant

ORDR
LAW OFFICE OF MARSHAL S. WILLICK, P.C.
MARSHAL S. WILLICK, ESQ.
Nevada Bar No. 002515
3551 E. Bonanza, Suite 101
Las Vegas, Nevada 89110-2198
(702) 438-4100
Attorney for Plaintiff

DISTRICT COURT
FAMILY DIVISION
CLARK COUNTY, NEVADA

LUPE CARMONA, Plaintiff, vs. JANIS CARMONA, Defendant.	) CASE NO: D181580) DEPT. F)) Date of Hearing: 7/15/998 [sic]) Time of Hearing: 8:30 a.m.)

ORDER

(Filed Jul. 27, 1999)

The Court entertained Defendant Janis Carmona's "Motion to Amend Findings of Court and its Order of April 16, 1999 (NRCP 52(b)) and Motion for New Trial (NRCP 59)" and her "Motion to Amend or Rescind Order Establishing Constructive Trust (filed June 22, 1999) (NRCP 52(b))," and Plaintiff Lupe Carmona, by and through his widow, Judy Carmona's, "Motion to Stay Briefing Schedule (5.25(b)) and Oral Argument Regarding Defendant's Motion and Notice of Motion to Amend Findings of Court and its Order of April 16, 1999 (NRCP 52(b)) and Motion for New Trial (NRCP 59) and Ordering the Establishment of a Constructive Trust." Judy Carmona

was present and represented by Marshal S. Willick, Esq., of the LAW OFFICE OF MARSHAL S. WILLICK, P.C., and Janis Carmona was present and represented by William E. Freedman, Esq.

Based upon the argument counsel, and good cause appearing therefor.

IT IS HEREBY ORDERED that because of the Court's familiarity with the case, and in order to prevent any further confusion, the Plaintiff's "Motion to Stay Briefing Schedule (5.25(b)) and Oral Argument Regarding Defendant's Motion and Notice of Motion to Amend Findings of Court and its Order of April 16, 1999 (NRCP 52(b)) and Motion for New Trial (NRCP 59) and Ordering the Establishment of a Constructive Trust" and "Motion for Substitution of Party," filed on May 21, 1999, and July 8, 1999, respectively, and the Defendant's "Motion to Amend Findings of Court and its Order of April 16, 1999 (NRCP 52(b)) and Motion for New Trial (NRCP 59)" and "Motion to Amend or Rescind Order Establishing Constructive Trust (filed June 22, 1999) (NRCP 52(b))," filed on April 29, 1999, and July 1, 1999, respectively, shall all be consolidated and heard by the Honorable Robert E. Gaston, District Court Judge, along with any other incidental litigation relating to this matter which is or may be pending in any other department of this Court; the intent of this Order is that all proceedings relating to this case be resolved by the same court.

IT IS FURTHER ORDERED that all proceedings relating to Plaintiff's "Motion to Stay Briefing Schedule (5.25(b)) and Oral Argument Regarding Defendant's Motion and Notice of Motion to Amend Findings of

Court and its Order of April 16, 1999 (NRCP 52(b)) and Motion for New Trial (NRCP 59) and Ordering the Establishment of a Constructive Trust" and "Motion for Substitution of Party," and the Defendant's "Motion to Amend Findings of Court and its Order of April 16, 1999 (NRCP 52(b)) and Motion for New Trial (NRCP 59)" and "Motion to Amend or Rescind Order Establishing Constructive Trust (filed June 22, 1999) (NRCP 52(b))," are stayed until such time as ancillary probate proceedings in the State of Nevada have resulted in the appointment of a Personal Representative for the estate of Lupe Carmona here in the State of Nevada, at which time any required Oppositions, Replies, etc., relating to any pending motions may be filed for the Court's consideration.

IT IS FURTHER ORDERED that upon the appointment of a Personal Representative, the parties shall renotice the above-mentioned motions.

IT IS FURTHER ORDERED that any and all monies received, to date or prospectively, by either Janis Carmona or Judy Carmona regarding Lupe Carmona, or the estate of Lupe Carmona, to expressly include any and all monies received from I.A.T.S.E. or the Hilton Hotel Corporation as and for retirement benefits or survivor benefits attributable to the pension plans of Lupe Carmona with I.A.T.S.E. or the Hilton Hotel Corporation shall be placed forthwith in an interest-bearing blocked account to be promptly set up by counsel, and that said account shall require the signature of both Marshal S. Willick, Esq. and William E. Freedman, Esq. for any withdrawal of funds.

IT IS FURTHER ORDERED that the deposit of those funds into that account shall continue until this

Court determines the entitlement of any party to those funds, and that funds from this account shall not be released until further order of the Court.

DATED this 27 day of July, 1999.

/s/ Robert E. Gaston
DISTRICT COURT JUDGE

Submitted by:

LAW OFFICE OF MARSHAL S. WILLICK, P.C.

/s/ Marshal S. Willick
Marshal S. Willick, Esq.
Nevada Bar No. 2515
3551 E. Bonanza Road, Suite 101
Las Vegas, Nevada 89110-2198
(702) 438-4100
Attorney for Plaintiff (deceased)
and Judy Carmona

IN THE SUPREME COURT OF THE
STATE OF NEVADA

JANIS CARMONA, A/K/A JANIS KESTER, Appellant, vs. JUDY CARMONA, AS SUCCESSOR REPRESENTATIVE OF LUPE N. CARMONA, DECEASED, Respondent.	No. 35851
JANIS CARMONA, A/K/A JANIS KESTER, Appellant, vs. JUDY CARMONA, AS SUCCESSOR REPRESENTATIVE OF LUPE N. CARMONA, DECEASED, Respondent.	No. 36220

ORDER DENYING REHEARING

(Filed Nov. 21, 2003)

Rehearing denied. NRAP 40(c).

It is so ORDERED.

/s/ Shearing, J.
Shearing

/s/ Leavitt, J.
Leavitt

/s/ Becker, J.
Becker

cc: Hon. Steven E. Jones, District Judge, Family Court Division
Hon. Robert E. Gaston, District Judge, Family Court Division
William E. Freedman, Chtd.
Marshal S. Willick
Clark County Clerk

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29 U.S.C. §1055. Requirement of joint and survivor annuity and pre-retirement survivor annuity

(a) Required contents for applicable plans

Each pension plan to which this section applies shall provide that –

(1) in the case of a vested participant who does not die before the annuity starting date, the accrued benefit payable to such participant shall be provided in the form of a qualified joint and survivor annuity, and . . .

(c) Plans meeting requirements of section

(1) A plan meets the requirements of this section only if –

(A) under the plan, each participant –

(i) may elect at any time during the applicable election period to waive the qualified joint and survivor annuity form of benefit or the qualified pre-retirement survivor annuity form of benefit (or both), and

(ii) may revoke any such election at any time during the applicable election period, and

(B) the plan meets the requirements of paragraphs (2), (3), and (4).

(2) Each plan shall provide that an election under paragraph (1)(A)(i) shall not take effect unless –

(A)(i) the spouse of the participant consents in writing to such election, (ii) such election designates a beneficiary (or a form of benefits) which

may not be changed without spousal consent (or the consent of the spouse expressly permits designations by the participant without any requirement of further consent by the spouse), and (iii) the spouse's consent acknowledges the effect of such election and is witnessed by a plan representative or a notary public, or

(B) it is established to the satisfaction of a plan representative that the consent required under subparagraph (A) may not be obtained because there is no spouse, because the spouse cannot be located, or because of such other circumstances as the Secretary of the Treasury may by regulations prescribe.

Any consent by a spouse (or establishment that the consent of a spouse may not be obtained) under the preceding sentence shall be effective only with respect to such spouse.

. . . .

(7) for purposes of this subsection, the term "applicable election period" means –

(A) in the case of an election to waive the qualified joint and survivor annuity form of benefit, the 90-day period ending on the annuity starting date, or . . .

(d) "Qualified joint and survivor annuity" defined

For the purposes of this section, the term "qualified joint and survivor annuity" means an annuity –

(1) for the life of the participant with a survivor annuity for the life of the spouse which is not less than 50 percent of (and is not greater than 100 percent of) the amount of the annuity which is

payable during the joint lives of the participant and the spouse, and

(2) which is the actuarial equivalent of a single annuity for the life of the participant.

Such term also includes any annuity in a form having the effect of an annuity described in the preceding sentence.

. . . .

(f) Marriage requirements for plan

(1) Except as provided in paragraph (2), a plan may provide that a qualified joint and survivor annuity (or a qualified pre-retirement survivor annuity) will not be provided unless the participant and spouse had been married throughout the 1-year period ending on the earlier of –

(A) the participant's annuity starting date, or

(B) the date of the participant's death.

(2) For purposes of paragraph (1), if –

(A) a participant marries within 1 year before the annuity starting date, and

(B) the participant and the participant's spouse in such marriage have been married for at least a 1-year period ending on or before the date of the participant's death,

such participant and such spouse shall be treated as having been married throughout the 1-year period ending on the participant's annuity starting date.

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29 U.S.C. §1056. Form and payment of benefits

(d) Assignment or alienation of plan benefits

(1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.

(3)(C) A domestic relations order meets the requirements of this subparagraph only if such order clearly specifies –

(i) the name and the last known mailing address (if any) of the participant and the name and mailing address of each alternate payee covered by the order,

(ii) the amount or percentage of the participant's benefits to be paid by the plan to each such alternate payee, or the manner in which such amount or percentage is to be determined,

(iii) the number of payments or period to which such order applies, and

(iv) each plan to which such order applies.

(D) A domestic relations order meets the requirements of this subparagraph only if such order –

(i) does not require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan,

(ii) does not require the plan to provide increased benefits (determined on the basis of actuarial value), and

(iii) does not require the payment of benefits to an alternate payee which are required to be paid to another alternate payee under

another order previously determined to be a qualified domestic relations order.

* * *

(F) To the extent provided in any qualified domestic relations order –

(i) the former spouse of a participant shall be treated as a surviving spouse of such participant for purposes of section 1055 of this title (and any spouse of the participant shall not be treated as a spouse of the participant for such purposes), and

(ii) if married for at least 1 year, the surviving former spouse shall be treated as meeting the requirements of section 1055(f) of this title.

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29 U.S.C. §1144. Other laws

(a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may not or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

. . . .

(c) Definitions

For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States

applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

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26 C.F.R. §1.401(a)-11(d)(3)(i)(ii)(iii) (1977)

(d) *Permissible additional plan provisions* – (I) In general. A plan will not fail to meet the requirements of section 401 (a-11) and this section merely because it contains one or more of the provisions described in paragraph (d)(2) through (4) of this section. . . .

(3) *Marriage requirements.* A plan may provide that a joint and survivor annuity will be paid only if –

(i) The participant and his spouse have been married to each other throughout a period (not exceeding one year) ending on the annuity starting date.

(ii) The spouse of the participant is not entitled to receive a survivor annuity (whether or not the election described in paragraph (c)(2) of this section has been made) unless the participant and his spouse have been married to each other throughout a period (not exceeding one year) ending on the date of such participant's death.

(iii) The same spouse must satisfy the requirements of subdivisions (i) and (ii) of this subparagraph.

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26 C.F.R. §1.401(a)-20(b)(3) (1996)

(3) Divorce. If a participant divorces his spouse prior to the annuity starting date, any elections made while the participant was married to his former spouse remain valid, unless otherwise provided in a QDRO, or

unless the participant changes them or is remarried. If a participant dies after the annuity starting date, the spouse to whom the participant was married on the annuity starting date is entitled to the QJSA protection under the plan. The spouse is entitled to this protection (unless waived and consented to by such spouse) even if the participant and spouse are not married on the date of the participant's death, except as provided in a QDRO.

Instructions for Employee Benefit Election

(Please read these instructions carefully before making your benefit election)

This form is designed to assist you in making a decision as to how your pension benefits are to be paid after you retire from Hilton. The choice you must make is whether you want to receive: (a) monthly pension payments only for yourself and in the full amount; (b) smaller monthly pension payments for yourself and thereby ensure that, after your death, regular monthly payments will be continued to (and for the lifetime of) your spouse; or (c) a single lump sum payment of your pension benefits.

If you wish to receive your benefits in the form of monthly pension payment *in the full amount* during your life, with no income payments provided for your spouse after your death, then put a cross (X) in the box beside FULL PENSION.

IF YOU WISH TO PROVIDE A SURVIVORSHIP BENEFIT for the lifetime of your spouse, commending after your death, then put a cross (X) in the box beside either JOINT AND SURVIVOR OPTION #1 or OPTION #2, whichever you desire. OPTION #1 provides that your spouse, if surviving after your death, will receive a benefit for life equal to 1/2 of your reduced pension. OPTION #2 provides that your spouse, if surviving after your death, will receive a benefit for life equal to 2/3 of your reduced pension. If you elect JOINT AND SURVIVOR OPTION #1 or OPTION #2, then the amount of pension you will receive will be smaller than your Full Pension. This is because the cost of providing payments to your spouse after you die must be charged against you, and this is done by reducing your pension. The amount of reduction in your pension will, of course, depend upon your spouse's age. Also, the amount of pension *you* will receive will be less under Option #2 than under Option #1.

IF YOU WISH TO TAKE A LUMP SUM PAYMENT in lieu of all pension payments to which you are otherwise eligible and entitled to receive, then put a cross (X) in the box beside LUMP SUM SETTLEMENT. In general, a lump sum settlement will not be granted unless you will have sufficient outside income after retirement to ensure your financial security and the Committee is satisfied that a lump sum payment is in your best interest. In addition, you will be required to submit evidence of your good health, as of your retirement date, to the Committee.

CHANGE OF BENEFIT ELECTION. You may change or revoke your benefit election at any time before your pension payments have started. Your benefit election becomes irrevocable when you receive your first pension payment.

YOUR CHOICE IS SUBJECT TO THE PLAN PROVISIONS. The instructions and provisions above merely summarize the major features of the optional benefits provided under the Plan. All benefits are subject to the provisions set forth in the Hilton Hotels Retirement Plan, as supplemented by such rules and interpretations as may be adopted by the Committee in its administrative capacity. If there is any variance between the instructions above and the Plan document or Committee rules, which may both be amended from time to time, the provisions of the latter shall govern.

IF YOU HAVE ANY QUESTIONS concerning this form, or if you want further information with respect to your specific situation, see your Personnel Office before completing this form. This form must be completed by you and returned to the Pension Committee in order for your benefit election to become effective.

HILTON HOTELS RETIREMENT PLAN
EMPLOYEE BENEFIT ELECTION

(Please Print)
EMPLOYEE NAME LUPE CARMONA
DATE OF BIRTH 6-6-26
CURRENT UNIT LAS VEGAS HILTON
SOC. SEC. NO. 560-20-4046

It is my understanding that under the Hilton Hotels Retirement Plan I may elect the form in which my retirement benefits are to be paid, subject to certain conditions. I hereby indicate the type of benefit I want to receive by placing a cross (X) in the appropriate box below.

TO BE VALID, ONLY ONE OF THE FOLLOWING BOXES SHOULD BE CHECKED

	STRAIGHT LIFE ANNUITY (No Death Benefit) I elect to receive the Straight Life Annuity option. I understand that I will receive benefits for my lifetime only. Upon my death, pension payments will cease.

	50% JOINT AND SURVIVOR OPTION I elect the 50% Joint and Survivor option with my spouse, _____, to receive a monthly survivor benefit for life after my death in an amount equal to one-half (1/2) of my reduced monthly pension. Spouse's Social Security Number _____ Spouse's Date of Birth _____

(Note: This option can only be elected if you are legally married.)

66 2/3% JOINT AND SURVIVOR OPTION

XXXXXXXXXXX

I elect the 66 2/3% Joint and Survivor option with my spouse, JANIS KESTER, to receive a monthly survivor benefit for life after my death in an amount equal to two-thirds (2/3) of my reduced monthly pension.

Spouse's Social Security Number
530-78-0724

Spouse's Date of Birth 4-3-60

(Note: This option can only be elected if you are legally married.)

10 YEAR CERTAIN AND LIFE OPTION

I elect to receive the Ten Year Certain option. I understand that I will receive benefits for my lifetime. My beneficiary will receive benefits if I receive less than ten years (120 months) of benefit payments. Payments, if any, will be distributed in equal shares to surviving beneficiaries indicated below. Beneficiary Designation:

Name Social Security Number

Name Social Security Number

(Beneficiary(ies) can only be spouse, parents, or children.)

I have read and understand the instructions and conditions indicated on the attachment to this form. I understand, and unconditionally accept the fact, that when I have made an optional benefit election, any benefits payable thereunder are subject to the provisions of the Plan, and that once payment is made or begins, I may not thereafter change my benefit election.

Date X Sept 3, 1992 By X Lupe N. Carmona
(Signature of Retiree)

(Rev. 1/90)

O'MELVENY & MYERS LLP

400 South Hope Street
Los Angeles, California 90071-2899

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VIA FACSIMILE (702) 438-5311
AND U.S. MAIL

Marshal S. Willick, Esq.
Law Offices
3551 East Bonanza Road
Las Vegas, Nevada 89110-2198

Re: Hilton Hotels Retirement Plan – Marriage of Carmona (Case No. D 181580)

Dear Mr. Willick:

The Hilton Hotels Retirement Plan (the "Plan") has forwarded to us various documents relating to the divorce of Plan participant Lupe Carmona ("Lupe") from Janis Kester ("Janis"). Our understanding is that Lupe was still married to Janis on his retirement date, and that he

elected the 66-2/3% joint and survivor annuity option at retirement with Janis as his surviving annuitant in the event he predeceases her. We also understand that Lupe and Janis were divorced on November 4, 1997.

Although we do not have a copy of the November 4, 1997 divorce decree or the proposed qualified domestic relations order, or "QDRO" (which apparently is a separate document from the divorce decree),[1] the subsequent order dated March 25, 1998 appears to provide that Lupe's entire interest in the Plan is awarded to him as his sole and separate property. The March 25, 1998 order also provides that the proposed QDRO be revised so that the survivor annuity is not waived by Janis, and leaves the determination of whether Lupe can change the survivor annuity to the Plan. Finally, the March 25, 1998 order appears to say that Lupe's benefit is to be modified into a life annuity based on his life expectancy.[2]

In your letter of June 10, 1998 to Vera Stoicof at Hilton, you set forth Lupe's position that he should be allowed to change his designated survivor, and you requested clarification from Hilton as to its position on the matter. We are treating your letter as a request that Lupe's designated survivor under his joint and survivor annuity be changed from Janis to his current spouse, Judy

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[1] We would like to receive a copy of the November 4, 1997 divorce decree and (if it is a separate document) the proposed QDRO at your earliest convenience so that the Plan's records will be complete.

[2] This last provision appears to contradict the court's order that the survivor annuity is not waived, but, as you will see below, it is not actually relevant with respect to either the Plan's position or applicable law.

Carmona ("Judy"), and that his benefit be recalculated accordingly to reflect the joint life expectancies of Lupe and Judy.

The Plan is an employee benefit plan subject to the Employee Retirement Income Security Act of 1974 ("ERISA") and the Internal Revenue Code of 1986. ERISA generally preempts any and all state laws insofar as they relate to an employee benefit plan. See 29 U.S.C. Section 1144(a).[3] ERISA also requires that a Plan be administered in accordance with its terms and that its rules be applied in a consistent manner. Plan policy generally prohibits a change of benefit option after payments have begun. For this reason alone, the Plan cannot accommodate your request.

Even if this policy were different, the Plan would still be legally prohibited from accommodating your request. This is because ERISA imposes a requirement that benefits be payable in the form of a qualified joint and survivor annuity ("QJSA") absent the written waiver and consent of the participant's spouse. This means that the participant must waive his right to a joint and survivor annuity and the participant's spouse must consent to that waiver. Such waiver and consent must be given during a specified election period. See Q&A #4 of Section 1.401(a)-20(b)(3) of the tax regulations, 26 CFR 1.401(a)-20. When a participant is divorced after the participant's annuity starting date (i.e., the date of retirement), the spouse to whom the

[3] An exception to the preemption rule is provided under 29 U.S.C. Section 1144(b)(7) for a domestic relations order issued under state law, but only if such order meets the requirements of a QDRO as defined in ERISA, 29 U.S.C. Section 1056(d)(3).

participant was married on the annuity starting date is entitled to receive the survivor benefit if the participant predeceases the spouse. This rule is embodied in Q&A #25 of Section 1.401(a)-20(b)(3) of the tax regulations, 26 CFR 1.401(a)-20, which provides as follows:

> If a participant dies after the annuity starting date, the spouse to whom the participant was married on the annuity starting date is entitled to the QJSA protection under the plan. The spouse is entitled to this protection (unless waived and consented to by such spouse) even if the participant and spouse are not married on the date of the participant's death, except as provided in a QDRO.

Thus, Janis is entitled to receive the survivor benefit unless the QJSA was waived by Lupe, and Janis consented to such waiver, prior to Lupe's retirement date. Lupe and Janis were still married on Lupe's retirement date, Lupe elected the joint and survivor annuity and, in accordance with applicable law, the spouse on Lupe's retirement date (i.e., Janis) is treated as Lupe's spouse, regardless of subsequent changes in marital status. This rule applies unless a QDRO which waives the spouse's right to survivor benefits is served on the Plan.

The March 25, 1998 order does not meet the criteria set forth for a QDRO under ERISA. We have carefully considered whether a domestic relations order which provides that all of the benefit is payable to the Plan participant could be a QDRO which would allow the Plan to change the form of benefit and/or the designated survivor, but have concluded that any such order does not constitute a QDRO because it does not establish the right of an alternate payee to receive all or part of the

participant's benefit and, therefore, does not satisfy the definition of a QDRO.

In light of the foregoing, the Plan cannot change Lupe's form of benefit nor can it allow Lupe to designate Judy as his designated survivor instead of Janis. As described above, applicable law requires that survivor benefits be paid to the spouse to whom the participant was married on the annuity starting date (i.e., Lupe's retirement date). The Plan has no choice but to pay the benefits in accordance with governing law.

If you have any questions, believe there are any relevant facts or points of law which we should consider, or if you would like any further clarification, please feel free to contact me.

Very truly yours,

/s/ Gregory B. Trotter
Gregory B. Trotter
Legal Assistant

GBT:cm

cc: William E. Freedman, Esq.
Ms. Janis Kester
Mr. Lynn Hein
Ms. Vera Stoicof

Nevada Resort Association – I.A.T.S.E. Local 720 Pension Trust

1820 East Sahara #310 • Las Vegas, Nevada 89104 • Telephone 369-0000

February 2, 1998

Mr. Lupe Carmona
204 Potential Drive
Hollister, MO 65672

Dear Mr. Carmona:

This letter is in response to your recent request to change the Joint & Survivor beneficiary on your pension pursuant to your divorce.

Your pension commenced as of October 1, 1992 with benefits payable under the 50% Joint & Survivor Annuity to your then spouse, Janis Kester. Under the Joint & Survivor Benefit, you receive a pension for your lifetime. If you predecease your spouse, she will commence to receive 50% of your benefit amount for her lifetime.

There is no provision in the Plan that permits a change of benefit form of payment after retirement has commenced.

A Qualified Domestic Relations Order (QDRO) cannot require the Plan to provide any benefit not otherwise provided under the Plan.

We regret to say that we cannot accommodate your request to delete and/or change the Joint Annuitant.

Very truly yours,

PENSION DEPARTMENT

/s/ Chila Silva
Chila Silva
Manager

CS/cf

cc: Janis Kester

Nevada Resort Association – I.A.T.S.E. Local 720 Pension Trust

1820 East Sahara #310 • Las Vegas, Nevada 89104 • Telephone 369-0000

May 13, 1997

Mr. Lupe Carmona
204 Potential Drive
Hollister, MO 65672

Dear Mr. Carmona:

This is to acknowledge receipt of your letter dated April 25, 1997 with durable Power of Attorney document appointing Judith Kay Walkington to act on your behalf on legal and personal matters.

The Nevada Resort Association – I.A.T.S.E. Local 720 Pension Plan pursuant to Article VII, Section 7.02 Joint and Survivor Annuity Benefits does not provide for any revocation after the benefit commencement date.

We are enclosing the following:

1. Copies of IRS Notice 97-11 Administrative Procedures for a Qualified Domestic Relations Order which should be referred to your attorney.

2. The Pension Trust Administrative Procedures and Checklist to follow in the preparation of a Qualified Domestic Relations Order which also should be referred to your attorney.

3. Nevada Resort Association – I.A.T.S.E. Local 720 Pension Trust Summary Plan Description (SPD)

Your pension commenced as of October 1, 1992 with benefits payable under the 50% Joint and Survivor Annuity. Under this benefit as the participant, you received

$474.13 monthly for your lifetime with your spouse benefit being $237.07 per month had you predeceased her. Due to benefit increases you are presently receiving a monthly benefit of $528.15 and should you predecease your spouse, your spouse would receive $264.08.

Very truly yours,

PENSION DEPARTMENT

/s/ Chila Silva
Chila Silva
Manager

Encs.